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No. 87-323

In the Supreme Court of the United States

OCTOBER TERM, 1987

VLADIMIR SOKOLOV, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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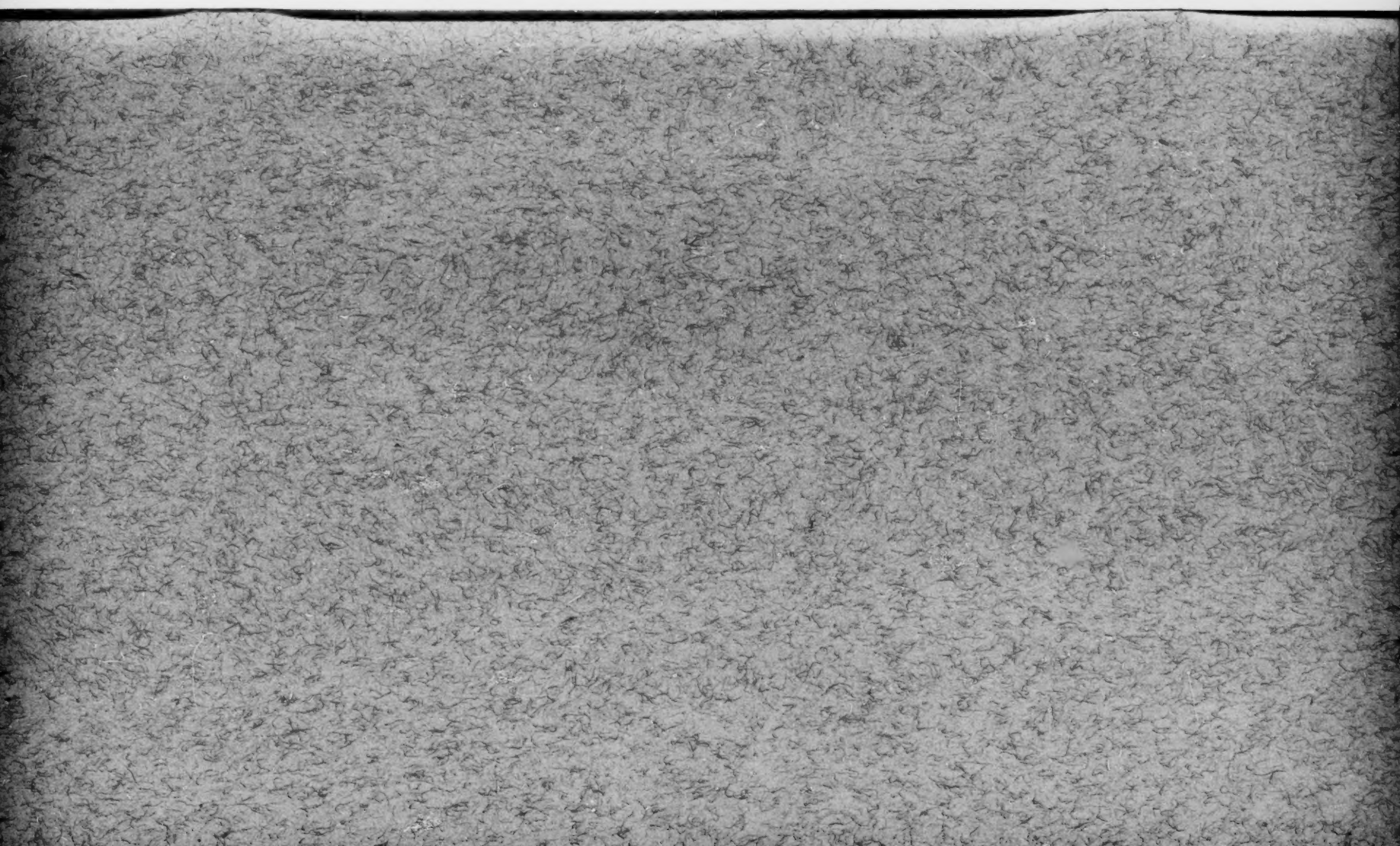

QUESTIONS PRESENTED

1. Whether the government established that petitioner's citizenship was illegally procured.

2. Whether petitioner's false statements to government officials were material.

3. Whether the court of appeals improperly engaged in de novo factfinding by concluding that petitioner had procured his citzenship by willfully misrepresenting material facts.

4. Whether petitioner was harmed by the district court's refusal to compel the government to turn over certain documents in his immigration file, where the district court and the court of appeals examined the file in camera and determined that it contained no exculpatory material.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 814 F.2d 864. The June 2, 1986, opinion of the district court (Pet. App. 29a-40a) and the May 11, 1987, memorandum of the district court on remand (Pet. App. 43a-53a) are unreported. The court of appeals' order of January 28, 1988 (App., *infra,* 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1987. A petition for rehearing was denied on May 28, 1987 (Pet. App. 27a-28a). The petition for a writ of certiorari was filed on August 24, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The government filed this action pursuant to 8 U.S.C. 1451(a) to revoke petitioner's citizenship on the grounds

that his citizenship was illegally procured and was procured by the concealment of material facts. After trial, the district court ruled that petitioner was subject to denaturalization on both the illegal procurement and material misrepresentation grounds (Pet. App. 29a-39a). The court of appeals provisionally affirmed the order of denaturalization but remanded the case for further proceedings in light of petitioner's claim that he was improperly denied access to certain documents in his immigration file or "A-file" (*id.* at 1a-26a). The district court subsequently examined the A-file and determined that it contained no exculpatory materials (*id.* at 44a). On January 28, 1988, the court of appeals affirmed the latter ruling (App., *infra,* 1a-2a).

1. Petitioner was born in 1913 in Orel, Russia. After Nazi Germany invaded the Soviet Union, petitioner obtained employment as a writer for *Rech,* a Russian-language newspaper controlled by a propaganda division of the German Army. The purpose of *Rech* was to spread Nazi propaganda throughout the Soviet Union. Pet. App. 5a, 30a.

During his employment with *Rech,* petitioner wrote numerous articles containing "vicious attacks on Jews" (Pet. App. 6a, 38a; see *id.* at 6a-7a (citing examples)). His work was viewed favorably by the Nazis, and he was awarded medals for "Bravery" and "Merit" in 1943 and was promoted to the position of deputy chief editor (*id.* at 5a). When the Germans retreated from the Soviet Union, petitioner fled as well. He accepted employment in Berlin as a writer for various German-controlled newspapers that similarly published Nazi propaganda and attacks on Jews (*ibid.*).

2. In May 1951, petitioner applied at the State Department's consular office in Wentorf, Germany, for admis-

sion to the United States under the Displaced Persons Act of 1948 (DPA), ch. 647, 62 Stat. 1009, as amended by the Act of June 16, 1950, ch. 262, 64 Stat. 219 (Pet. App. 10a). The DPA had been passed by Congress to permit refugees who had been driven from their homelands during and after World War II to emigrate to the United States without regard to traditional immigration quotas. Under that Act, "eligible displaced persons" were those displaced persons or refugees who were specified in the Constitution of the International Refugee Organization (IRO), Dec. 16, 1946, 62 Stat. 3037, T.I.A.S. No. 1846, 18 U.N.T.S. 3, as being of "concern" to the IRO (DPA § 2, 62 Stat. 1009). The IRO Constitution provided that persons were not of "concern" if they had "assisted the enemy in persecuting civil populations" or had "voluntarily assisted the enemy forces since the outbreak of the second world war * * *" (Annex I, Pt. II, para. 2, 62 Stat. 3051-3052). Section 10 of the DPA, 62 Stat. 1013, provided that "[a]ny person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." And Section 13 of the DPA, 62 Stat. 1014, as amended by the Act of June 16, 1950, ch. 262, § 11, 64 Stat. 227, barred the issuance of a visa to any applicant who had "advocated or assisted in the persecution of any person because of race, religion, or national origin" or who had "participated in any movement which is or has been hostile to the United States or the form of government of the United States."

Petitioner's visa application was granted, and he was admitted to the United States in June 1951, after he signed an affidavit stating that he had "never advocated or assisted in the persecution of any person because of race, religion or national origin" (Pet. App. 10a). At petitioner's

denaturalization trial, the government offered expert testimony from the State Department official in charge of the consular program at the displaced persons camp at Wentorf. That official testified that, to ascertain an applicant's eligibility under the DPA, vice consuls routinely inquired whether the applicant had voluntarily assisted the Nazi war effort. According to that official, anyone who had written anti-Semitic or pro-Nazi articles for a Nazi propaganda newspaper would have been routinely denied a visa. *Id.* at 10a & n.1.

In 1956, petitioner applied for naturalization. He maintained under oath that he had not given false testimony for the purpose of obtaining benefits under the immigration and naturalization laws (Pet. App. 11a). During its investigation, the Immigration and Naturalization Service (INS) learned from an FBI informant that petitioner had worked for *Rech* as a Nazi collaborator. When an INS investigator asked petitioner whether *Rech* had been a pro-fascist anti-Semitic newspaper, he responded by stating (*id.* at 12a-13a), " '[p]ersonally, I confined myself to anti-communist articles. I have not written one single fascist or pro-fascist line and as to anti-Semitic remarks, there may have been some to which I was forced.' " The naturalization examiner, who did not have access to copies of *Rech*, recommended that petitioner be granted naturalization, and petitioner subsequently became a United States citizen (*id.* at 13a).

2. In January 1982, the government commenced denaturalization proceedings. The case was tried in November 1985, and the district court filed its findings of fact and conclusions of law on June 2, 1986 (Pet. App. 29a). The district court found that petitioner's citizenship—which was premised on the visa he had obtained under the DPA—had been illegally procured because his

articles for *Rech* rendered him not of "concern" to the Displaced Persons Commission and therefore ineligible for a visa (*id.* at 37a). Additionally, the court found that petitioner had willfully misrepresented and concealed his true wartime activities from United States immigration and naturalization officials and that his misrepresentations to those officials were material (*id.* at 37a, 39a).

The court of appeals provisionally affirmed the order of denaturalization but remanded the case for further proceedings (Pet. App. 1a-26a). While the court held that the government had failed to satisfy its burden of showing that material misrepresentations were made at the visa application stage (*id.* at 15a-17a), it nonetheless concluded that denaturalization was justified because petitioner, through his employment with *Rech,* had assisted in and advocated the persecution of Jews, had assisted enemy forces, and had participated in a movement hostile to the United States. Those activities, the court found, rendered him ineligible for a visa under the DPA and thus established that his citizenship had been illegally procured. *Id.* at 21a-23a. The court also found that denaturalization was warranted because of petitioner's misrepresentations to an INS investigator in connection with his citizenship application. The court reasoned that, if the INS investigator had discovered that petitioner had lied in stating that he had not written anything that was pro-fascist, petitioner would have been ineligible for naturalization. *Id.* at 19a-20a.

The court of appeals, however, granted petitioner limited relief. Petitioner had maintained that portions of his A-file had been improperly withheld from him (see Pet. App. 23a-25a). The court of appeals acknowledged the government's submission that only privileged documents had been removed from the file that was given to peti-

tioner, but the court concluded that it had "no way of knowing" if that was the case "absent in camera inspection of the A-file." Accordingly, the court of appeals remanded the matter to the district court "for such an inspection." *Id.* at 24a.

The district court subsequently held an in camera inspection. It found that the documents in the file "would [not] have been of any value to defendant even assuming that none were privileged under *Hickman* v. *Taylor,* 329 U.S. 495, 510-511 (1947)" (Pet. App. 44a). On May 14, 1987, petitioner filed exceptions to the district court's ruling. On June 18, 1987, petitioner's attorney sent a copy of those exceptions—which the district court had not ruled upon—to Judge Oakes, who had authored the court of appeals' opinion, and requested that the panel conduct its own independent review of the A-file. On August 21, 1987, the court of appeals ordered a further hearing on that issue. Petitioner's attorney subsequently wrote to Judge Oakes requesting clarification of the court's order. On October 5, 1987, the clerk of the Second Circuit, acting on behalf of the court, asked the parties to discuss "how the August 21, 1987 order should be clarified." The government responded by arguing that the August 21, 1987, order was improvidently issued and should be vacated because no further proceedings were warranted. The government noted, inter alia, that the district court had followed the court of appeals' remand order and that what petitioner was really complaining about was the remand order itself. Petitioner responded to the clerk's letter by urging that the A-file be reviewed—apparently by the court of appeals itself—in a proceeding in which his attorney could be present and make an offer of proof as to each document.

At the time petitioner filed his petition for a writ of certiorari, the Second Circuit had not yet issued a further ruling. On September 18, 1987, petitioner filed a motion with this Court to defer consideration of the petition until after the Second Circuit had completed its proceedings involving the A-file. The government thereafter filed a memorandum with this Court expressing its agreement that the Court should defer consideration of the petition. On December 14, 1987, the Court granted petitioner's motion.

On January 28, 1988, the court of appeals entered an order stating in relevant part (App., *infra,* 1a-2a): "We have examined a copy of the A-file of [petitioner] * * * [and] conclude that the district court, in ruling that none of the documents in that file had any value to [petitioner], did not abuse its broad discretion over discovery matters."

In light of the court of appeals' order of January 28, 1988, the case is now in a proper posture for this Court to consider the petition. Accordingly, we are now responding on the merits to the various claims raised by petitioner.

ARGUMENT

1. Petitioner contends (Pet. 10) that the court of appeals erred in concluding that he was ineligible for a visa under the DPA and that his citizenship, which was based on that visa, was therefore illegally procured. That argument lacks merit. The court of appeals concluded that petitioner was ineligible for a visa under the DPA for three separate reasons; each is independently sufficient to support the order of denaturalization.

The court of appeals first found that petitioner, as a Nazi propagandist for *Rech,* had advocated and assisted in the persecution of Jews (Pet. App. 21a-22a). Petitioner maintains (Pet. 9) that there was insufficient proof that he

had actually persecuted anyone in the course of his employment with *Rech*. That argument, however, overlooks the explicit language of Section 13 of the DPA, upon which the court of appeals relied, that any person who "advocated" *or* "assisted" in the persecution of persons based on race, religion, or national origin was ineligible for a visa. The evidence—credited by the district court—that petitioner had authored numerous anti-Semitic articles on behalf of the Nazi regime provided an ample basis for the court's holding that petitioner "advocated" persecution and was therefore ineligible for a visa. In any event, as the court of appeals noted (Pet. App. 22a), petitioner "assisted" in persecution "by creating a climate of opinion in which such persecution is acceptable."

The second basis for the court's affirmance on illegal procurement grounds was that petitioner had assisted enemy forces (Pet. App. 22a-23a). Petitioner contends (Pet. 10) that the court did not find "that [he] voluntarily assisted enemy forces, but that mere assistance rendered him ineligible." That argument ignores critical findings below. The district court found that petitioner had carried out all of his assignments for *Rech* without any complaint or objection (Pet. App. 35a), that he had established his commitment to Nazi ideology prior to his employment (*id.* at 30a-31a), that he received various awards and preferential benefits as an employee of *Rech* (*id.* at 31a), and that the evidence established "beyond doubt that [petitioner's] heart and mind were on the side of the enemy" (*id.* at 38a). The court of appeals examined these findings and observed that the evidence supported a finding that petitioner "*voluntarily* wrote anti-semitic articles for *Rech*"

(*id.* at 22a (emphasis added)). Thus, there is no merit in petitioner's claim that his actions were not voluntary.[1]

The third basis for the court of appeals' illegal procurement holding was that petitioner's employment on behalf of the Nazis placed him in a movement hostile to the United States, thus rendering him ineligible for a visa under Section 13 of the DPA (Pet. App. 23a). Petitioner's argument in response to that ruling seems to be that the court failed to find that his membership in the Nazi movement was voluntary (Pet. 9-11). As we have noted, however, the evidence clearly established that petitioner's affiliation with *Rech* was voluntary. In any event, the portion of Section 13 relied upon by the court of appeals contains no voluntariness requirement. Cf. *Fedorenko* v. *United States,* 449 U.S. 490, 509-514 (1981) (holding that Annex I, Pt. II, para. 2(a) of the IRO Constitution, which excluded from the definition of "refugee" someone who "assisted the enemy in persecuting civil[ians]," did not contain a voluntariness requirement).

2. Petitioner contends (Pet. 11-15) that the court of appeals erred in concluding that his misrepresentations at the naturalization stage were material. He claims that the decision below conflicts with the test for materiality adopted by this Court in *Chaunt* v. *United States,* 364

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[1] Petitioner errs in relying (Pet. 10) on the Act of Mar. 28, 1951, ch. 23, 65 Stat. 28, to support his claim that his acts were not voluntary. That provision, which was repealed a year later (see Immigration and Nationality Act of 1952, ch. 477, § 403(a), 66 Stat. 279-280), addressed solely the excludability of members of anarchistic and similar groups under the Immigration Act of 1918, ch. 186, 40 Stat. 1012. Petitioner did not enter the United States under the 1918 Immigration Act, and he was not charged with having been a member of any anarchistic organization whose activities were proscribed under that Act.

U.S. 350 (1960),[2] and with the standard of materiality adopted by the Tenth Circuit (Pet. 11, 13).[3]

Initially, it should be emphasized that the court of appeals' holding that petitioner was subject to denaturalization because of his material misstatements was entirely separate from its holding that denaturalization was required on grounds of illegal procurement. Accordingly, even if petitioner were correct that the court of appeals applied the wrong materiality standard, the result would not change because petitioner is properly subject to denaturalization for the three additional reasons discussed above.

In any event, petitioner's statements were plainly material even under the most restrictive interpretation of *Chaunt*. The court of appeals observed that if the INS investigator had discovered petitioner's wartime employment as a Nazi propagandist, petitioner "would not have

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[2] In *Chaunt*, the Court held that the statements at issue there were not material because the government had failed to show "either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship" (364 U.S. at 355).

[3] Although he does not cite a specific Tenth Circuit case, petitioner is presumably referring to *United States* v. *Sheshtawy*, 714 F.2d 1038 (1983). Petitioner also claims, without citation, that the decision below conflicts with the standard of materiality applied by the Third Circuit (Pet. 11). However, in *United States* v. *Kungys*, 793 F.2d 516, 526-527 (1986), a case now pending before this Court (No. 86-228 (reargued Oct. 7, 1987)), the Third Circuit applied the standard of materiality adopted by the Second Circuit in *Maikovskis* v. *INS*, 773 F.2d 435, 442 (1985), cert. denied, 476 U.S. 1182 (1986), *i.e.*, whether the disclosure of the true facts "probably would have led to the discovery of facts warranting the denial of a visa." The court below similarly indicated that it was applying the standard of materiality adopted in *Maikovskis* (Pet. App. 20a).

been eligible for naturalization" (Pet. App. 19a). Put another way, if the true facts had been known at the time of petitioner's naturalization petition, those facts would have resulted in the denial of the petition. Petitioner's misstatements were therefore material under any conceivable materiality standard.[4]

3. Petitioner asserts (Pet. 15) that the court of appeals engaged in improper de novo factfinding by ruling that petitioner's false statements at the naturalization stage were material. That claim does not warrant further review. While the district court in its opinion did not discuss petitioner's specific misstatements at the naturalization stage, it did hold that petitioner had made a material misrepresentation before the "District Court of the Eastern District of New York" (Pet. App. 37a), the court which granted his naturalization petition (*id.* at 29a). Since petitioner's misstatements to the INS investigator were in the context of an investigation incident to his application for citizenship, the district court was presumably referring to the statements petitioner made to the investigator. Thus, the court of appeals did not decide the issue de novo. Rather, it simply determined, based on an independent analysis of the record, that the district court's finding was supported by the evidence at trial. See *Fedorenko,* 449 U.S. at 506 ("[I]n reviewing denaturalization cases, we have carefully examined the record ourselves.").

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[4] For these reasons, there is no need for the Court to hold this case pending its decision in *Kungys* v. *United States,* No. 86-228. Even under the standard of materiality proposed by the petitioner there—whereby the government must prove that a visa or naturalization petition *would not* have been granted had the government officials known the true facts—the misstatements here were material. Moreover, because the material misrepresentation ground was only one of several independent bases for denaturalization, the result in this case would not change even if petitioner were to prevail on that issue.

4. Finally, petitioner claims that his constitutional rights were violated because he was denied the opportunity to review certain documents in his A-file. That claim is groundless. Both the district court and the court of appeals reviewed petitioner's A-file, and both courts rejected his assertion that the file contained exculpatory documents. Petitioner asserts that the A-file might have contained information helpful to him in several respects (see Pet. 22) bearing on the materiality of his false statements. The district court, however, specifically found that "not one of the [withheld] documents * * * would have been of any value to [petitioner]" (Pet. App. 44a), and the court of appeals, after its independent review of the file, upheld that judgment (App., *infra,* 1a-2a). Petitioner's speculation that the contents of the file might have been helpful to him is therefore without merit and does not warrant further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1988

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 86-6157

UNITED STATES OF AMERICA, APPELLEE

v.

VLADIMIR SOKOLOV, A/K/A
VALDIMIR DMETRIVICH SOKOLOV, A/K/A
VLADIMIR SOKOLOV-SAMARIN, A/K/A
VLADIMIR SAMARIN, APPELLANT

Jan. 28, 1988

ORDER

Present: Hon. James L. OAKES, Hon. Richard J. CARDAMONE, Hon. Oscar H. DAVIS,* Circuit Judges.

We have examined a copy of the A-file of Vladimir Sokolov as certified by the Director of the Records Management Branch of the Immigration and Naturalization Service as of December 21, 1987. We conclude that the district court, in ruling that none of the documents in that file had any value to Sokolov, did not abuse its broad

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* Of the United States Court of Appeals for the Federal Circuit, sitting by designation.

discretion over discovery matters. *See Robertson v. National Basketball Ass'n,* 622 F.2d 34, 36 (2d Cir. 1980).

/s/ James L. Oakes
JAMES L. OAKES
/s/ Richard J. Cardamone
RICHARD J. CARDAMONE
/s/ Oscar H. Davis
OSCAR H. DAVIS
Circuit Judges

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